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No. 90-982

In The

Supreme Court of the United States

October Term, 1990

RANBIR S. SAHNI,

Petitioner,

v.

HARBOR INSURANCE COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

The facts do not present the issue petitioner suggests. Harbor was a defendant in the original suit before the action was removed to federal court. All along, the claim for relief against Harbor was of significant interest to the Federal Savings and Loan Insurance Corporation ("FSLIC"), since a finding of coverage under the Harbor insurance policies could result in disbursements to the FSLIC, which, in turn, could be used to offset losses suffered by the failed financial institution in question. The FSLIC even actively opposed Harbor's motion for summary judgment by presenting its own memorandum of points and authorities opposing Harbor and by joining Sahni's opposition to Harbor's motion as well as Sahni's cross-motion for summary judgment. Thus, the question is:

Should this Court review the Ninth Circuit's decision that affirmed the district court's finding that sufficient federal subject matter jurisdiction existed under 12 U.S.C. Section 1730(k)(1) and Rules 14 and 20 of the Federal Rules of Civil Procedure in order to entertain cross-motions for summary judgment concerning a third-party claim when:

1) The third-party claim was very closely related to the main suit;

2) The third-party defendant was originally a defendant in the main suit, but was dismissed with prejudice against the FSLIC's wishes; and

RESTATEMENT OF QUESTION PRESENTED – Continued

3) The FSLIC actively participated in these cross-motions by separately opposing the third-party defendant and by joining third-party plaintiff's efforts in opposing the third-party defendant.

PARTY RESPONDENT

Harbor Insurance Company[1]

PARENT AND SUBSIDIARY CORPORATIONS

The Continental Corporation – former parent (see n.1).

There are no subsidiaries.

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[1] In a transaction that was completed on December 12, 1990, The Continental Insurance Company, a subsidiary of The Continental Corporation, sold the Harbor name and license, but assumed the rights and liabilities under the Harbor Policies. Accordingly, The Continental Insurance Company is now the real party in interest in place of Harbor Insurance Company.

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PRELIMINARY STATEMENT

There is no reason why this Court should grant the petition sought by Petitioner Ranbir S. Sahni ("Sahni"). The petition was never properly served on Respondent Harbor Insurance Company ("Harbor"); Sahni's petition should be denied on that ground alone.

More importantly, this case is of no interest except to the parties to the cross-motions for summary judgment. The question presented concerns a very narrow issue: whether there is federal subject matter jurisdiction under 12 U.S.C. Section 1730(k)(1) and Rules 14 and 20 of the Federal Rules of Civil Procedure for third-party defendant Harbor's motion for summary judgment against Sahni that was opposed by both the Federal Savings and Loan Insurance Corporation ("FSLIC") and Sahni in an action in which the FSLIC was a defendant.

The Ninth Circuit's opinion below should also not be reviewed because its unanimous decision (*California Union Insurance Co. v. American Diversified Savings Bank*, 914 F.2d 1271 (9th Cir. 1990) (hereinafter, the "*Cal Union* Opinion")) applied well-settled principles of law that are not in conflict with any decision of another United States court of appeals or of this Court. In fact, the *Cal Union* Opinion was based on a recent unanimous ruling by this Court. *Federal Savings and Loan Insurance Corp. v. Ticktin*, 490 U.S. 82, 109 S. Ct. 1626, 104 L. Ed. 2d 73 (1989).

STATEMENT OF FACTS

Harbor, Sahni and the FSLIC (as conservator of American Diversified Savings Bank ("ADSB")) as well as other insurers were named as defendants in a declaratory relief action in state court. Plaintiff, another insurance company, agreed with Harbor that the Harbor policy provided no coverage for the claims relating to this litigation and dismissed Harbor with prejudice. However, as evidenced by later conduct, both the FSLIC and Sahni disagreed with the decision to dismiss Harbor. After the FSLIC removed the action to federal court pursuant to 12 U.S.C. Section 1730(k)(1), Sahni brought a motion for leave to file a third-party complaint seeking to bring Harbor back into the suit. The court agreed that Sahni's claim for relief against Harbor was so closely related to the main suit that it should be heard along with all other claims for relief in one federal forum. After being returned to the suit, Harbor presented a motion for summary judgment, which both Sahni and the FSLIC vigorously opposed.[2] The court granted Harbor's motion and Sahni appealed.

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[2] Sahni, in his petition, omitted the important fact that the FSLIC presented its own memorandum of points and authorities in opposition to Harbor's motion for summary judgment. Sahni also omitted the material fact that the FSLIC did not just join Sahni's motion, but also joined Sahni's opposition to Harbor's motion. The FSLIC's joinder and memorandum were part of the record on appeal (Tabs 67 and 68, respectively); Harbor filed these documents with the Ninth Circuit in its *Excerpt of Record in Support of "Appellee's Supplemental Brief."*

In an unanimous decision, which was written by Judge Mary M. Schroeder, the Ninth Circuit affirmed the trial court's finding of jurisdiction based upon Congress' broad grant of federal subject matter jurisdiction under Section 1730(k)(1) and pursuant to Federal Rules of Civil Procedure, Rules 14 and 20. The decision was filed on September 17, 1990 and was published at 914 F.2d 1271 (9th Cir. 1990). On December 17, 1990, Sahni apparently filed a petition for a writ of certiorari with this Court, but failed to serve Harbor.

REASONS THE WRIT SHOULD BE DENIED

I.

SAHNI'S PETITION FOR WRIT OF CERTIORARI IS JURISDICTIONALLY OUT OF TIME AND SHOULD BE DENIED

Supreme Court Rule 12.1 provides, in part, that:

> "[t]he petitioner's counsel, who must be a member of the Bar of this Court, shall file, *with proof of service as provided by Rule 29*, [the petition]. . . . *It shall be the duty of counsel for the petitioner to notify all respondents* on a form supplied by the Clerk, of the date of filing and of the docket number of the case." (Emphasis added.)

In the present case, since the *Cal Union* Opinion was filed September 17, 1990, Sahni was required to file *and serve* a petition for writ of certiorari by December 17, 1990. (Supreme Court Rule 13.1.) Harbor, *the only party that opposed Sahni before the Ninth Circuit*, however, was not served with Sahni's petition for writ of certiorari and was not notified of the date of filing or the docket

number. In fact, Harbor was unaware of the existence of Sahni's petition until January 8, 1991.[3]

Pursuant to Supreme Court Rule 13.3, the "Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time." Since Sahni's petition was not served on Harbor, the only respondent, the petition is jurisdictionally out of time and should be denied immediately on that ground alone.

II.

THE NINTH CIRCUIT'S DECISION IS NOT SIGNIFICANT TO ANY PARTY OTHER THAN THE LITIGANTS THEMSELVES

Due to the unique sequence of events in this action, the jurisdictional question is so limited that it would

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[3] On January 8, 1991, Harbor's counsel learned through a third party, Cockle Law Brief Printing Company, that Sahni had filed a petition on December 17, 1990. Harbor's counsel subsequently requested and received a copy of Sahni's petition from Sahni's counsel via telecopy.

Harbor is not even partly responsible for the delay in finding out about the petition for writ. Between December 17 and 28, 1990, Harbor's counsel telephoned the offices of Michael G. Dawe, the attorney who represented Sahni in the district court and on appeal, and left messages asking if a petition for a writ of certiorari had been filed. On January 3, 1991, Harbor wrote to Mr. Dawe posing the same question. Harbor received no response to any of these inquiries.

Harbor further requests that this Court take judicial notice of the fact that neither Harbor nor Harbor's counsel was listed on Sahni's proof of service; the lack of notice to Harbor cannot be attributed to a mistake by the United States Postal Service.

probably never apply to anyone other than the parties in this lawsuit. At most, this Court would be clarifying a minute question of jurisdiction that is of interest to an extremely small number of parties.

The issues here do not concern a question that is as broad as the extent of federal jurisdiction under Section 1730(k)(1) over related state claims. The petition does not even concern a more limited question regarding whether federal jurisdiction exists under Section 1730(k)(1) over third-party state claims pursued in an action that was removed by the FSLIC. This case involves the extremely limited question of whether Congress intended to extend federal jurisdiction under Section 1730(k)(1) pursuant to Rules 14 and 20 over cross-motions for summary judgment on a third-party claim that is closely related to the main claims when the FSLIC actively participated in the cross-motions and considering the fact that the third-party defendant was originally a defendant in the main suit. It would be astonishing if this jurisdictional question ever arose again.

More importantly, a decision by this Court would not have any lasting impact on this very specific issue. If this Court were to hold that federal jurisdiction did not exist under these peculiar circumstances, a future litigant in Harbor's position could simply file a cross-claim for declaratory relief against the FSLIC and the other litigants pursuant to Federal Rules of Civil Procedure, Rules 13 and 14 before presenting its motion for summary judgment. The FSLIC would then be a party in the exact same claim for relief and there would be no question that jurisdiction would exist under Section 1730(k)(1). A decision by this Court reversing the *Cal Union* Opinion *would*

therefore not reduce the number of federal court matters in the United States by a single case.

III.

THE *CAL UNION* OPINION APPLIED WELL-SETTLED PRINCIPLES OF LAW THAT ARE NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY UNITED STATES COURT OF APPEALS.

In the present case, the *Cal Union* Opinion was based on well-settled principles of law. The Ninth Circuit determined federal question jurisdiction through literal statutory interpretation. The court of appeals analyzed Congress' broad grant of jurisdiction under Section 1730(k)(1) and concluded that, pursuant to Rules 14 and 20, federal jurisdiction should extend to Sahni's claim for relief against Harbor, especially given the FSLIC's active interest in Sahni's claim. The Ninth Circuit stated that Section 1730(k)(1) was intended to permit federal courts to deal with all proceedings in which the FSLIC is a party.

The Ninth Circuit also correctly noted that its decision was in perfect harmony with the unanimous decision by this Court in *Federal Savings and Loan Insurance Corp. v. Ticktin*, 490 U.S 82, 109 S. Ct. 1626, 104 L. Ed. 2d 73 (1989). In *Ticktin*, this Court stated that Section 1730(k)(1)(B) "enlarges the category of FSLIC litigation over which federal courts have jurisdiction because it covers all civil cases in which the FSLIC 'shall be a party.' " *Id.* at ___, 109 S. Ct. at 1628. The broad grant of jurisdiction under Section 1730(k)(1) is not limited to suits against the United States or claims brought by the FSLIC; Section 1730(k)(1) allows jurisdiction over all suits in which the

FSLIC is a party. Such a widespread extension of jurisdiction logically includes third-party complaints that are closely related and pendent to the main suit in which the FSLIC is a party.

In addition, since the FSLIC filed a memorandum of points and authorities opposing Harbor's motion for summary judgment and appeared at the hearing on the cross-motions, the FSLIC was a party and an active participant in the proceeding that resulted in the appeal and this petition. Section 1730(k)(1) provides subject matter jurisdiction over "any civil action, suit, or *proceeding* to which the [FSLIC] shall be a party. . . . " (Emphasis added.) Therefore, at the very least, federal jurisdiction existed over the hearing on the cross-motions.

The *Cal Union* Opinion also does not conflict with a decision by this Court or by another United States court of appeals. There is no decision by this Court or by a United States court of appeals that holds that the grant of jurisdiction under Section 1730(k)(1) is so limited that it would not permit federal subject matter jurisdiction over a closely related third-party complaint that is part of a suit to which the FSLIC is a party (*see, e.g., Carrollton-Farmers Branch Independent School District v. Johnson & Cravens*, 889 F.2d 571, 572 (5th Cir. 1989) (jurisdiction exists under Section 1730(k)(1) "to all suits to which the FSLIC is a party. . . . "); *Federal Savings and Loan Insurance Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir 1989) (jurisdiction exists under Section 1730(k)(1) whether the FSLIC brings an action in its corporate or receivership capacity)).

IV.

FINLEY V. UNITED STATES AND THE LAW OF PENDENT PARTY JURISDICTION IS IRRELEVANT IN THE PRESENT LITIGATION; THE *FINLEY* DECISION DID NOT ALTER THE LAW IN THE NINTH CIRCUIT.

What makes Sahni's petition so frivolous is Sahni's misguided assertion that this Court's decision in *Finley v. United States*, 490 U.S. 545, 109 S. Ct. 2003, 104 L. Ed. 2d 593 (1989) altered the law in the Ninth Circuit. The five-to-four *Finley* decision effectively affirmed a long-standing rule in the Ninth Circuit concerning the extent of federal jurisdiction under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. Section 1346(b). More than thirteen years ago, in *Ayala v. United States*, 550 F.2d 1196 (9th Cir.), *cert. granted*, 434 U.S. 814, *cert. dismissed*, 435 U.S. 982 (1977), the Ninth Circuit reached the same result as this Court did in *Finley*, holding that pendent party jurisdiction did not extend to claims brought against parties other than the United States, if the FTCA provided the only basis for pendent party jurisdiction.

Yet, even the decision in *Finley* supports the *Cal Union* Opinion. In *Finley*, this Court based its decision on a careful analysis of the statutory language of the FTCA. This Court held that Congress granted very limited jurisdiction under FTCA because Congress had stated in the FTCA that it only permitted "jurisdiction over 'civil actions on claims against the United States' "; Congress did "not say 'civil actions on claims that include requested relief against the United States,' nor 'civil actions in which there is a claim against the United States' – formulations one might expect if the presence of

a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions." *Id.* at ___, 109 S. Ct. 2008.

Since Section 1730(k)(1) grants much broader federal jurisdiction than the FTCA, a careful reading of Section 1730(k)(1), like the reading of the FTCA by the *Finley* Court, would lead to the conclusion that Congress intended to grant widespread jurisdiction over suits involving the FSLIC. Sahni's contention that the *Finley* opinion altered the unanimous decision in *Ticktin* is even more ridiculous since the *Finley* decision contains no reference to *Ticktin* and the two cases were argued on consecutive days and were decided only seven weeks apart.

CONCLUSION

There is no sound reason why this Court should exercise its judicial discretion in granting Sahni's petition. The petition is jurisdictionally out of time; it was never served on the respondent or on respondent's counsel. Sahni is not entitled to any relief for this egregious jurisdictional error and the petition should be dismissed on this ground alone.

Furthermore, the case involves such a limited jurisdictional issue that it would provide no guidance for other FSLIC cases, nor would it meaningfully flesh out the extent of federal jurisdiction under Section 1730(k)(1). Sahni's petition concerns the propriety of the *Cal Union* Opinion's affirmance of federal jurisdiction over cross-motions for summary judgment concerning a closely related third-party claim in a declaratory relief action in

which the FSLIC participated. It is unlikely this issue will arise again, but if it does, the third-party defendant will merely file a cross-claim against the FSLIC and others ensuring jurisdiction under Section 1730(k)(1).

Furthermore, the *Cal Union* Opinion was based on unquestioned principles of law. Simply stated, the Ninth Circuit did nothing more than apply the rule for federal subject matter jurisdiction for FSLIC suits that was enunciated by the unanimous decision of this Court in *Ticktin*. This Court in *Ticktin* held that Section 1730(k)(1) intended to permit the resolution of competing claims in a single federal forum if the FSLIC was a party in the litigation. The *Cal Union* Opinion also does not conflict with any other decision of this Court or of the United States court of appeals.

Finally, since the opinion in *Finley* does not alter the scope of jurisdiction under Section 1730(k)(1), the *Finley* decision cannot be the basis for any review of the *Cal Union* Opinion.

Respondent Harbor Insurance Company therefore respectfully requests that this Court deny Sahni's petition for a writ of certiorari.

Respectfully submitted,

January 1991

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